

WEST TISBURY  
CONSERVATION COMMISSION  
MINUTES OF MEETING  
October 12, 2021

The meeting was held via Zoom in accordance with the Governor's order suspending certain provisions of the Open Meeting Law, G.L. c.30A sec.20. Public participation will be via remote participation (Zoom) pursuant to M. G. L. Chapter 20 of the Acts of 2021.

**Present:** John Brannon, Geraldine Brooks, Whit Griswold, Angela Luckey, Donna Paulnock and Peter Rodegast

**Absent:** Michael Turnell

**Staff Present:** Maria McFarland

**Also present for all or part of the meeting:** Mark Anderson, Les Baer, Edmund Cottle, Robert Doane, Cheryl Eppel, Doug Finn, Ben Hall, Richard Hennessey, Libby Soo Hoo, Janet Johnson, Richard Johnson, Mercedes Kelso, Tom Liddy, Jonathan Previant, William Schneider, Barbara Smith, Scott Smyers, Martha Spencer, Jane Varkonda, Ben and Thorumm Zimmerman

Whit Griswold called the meeting to order at 5:06 P.M.

Minutes: The minutes of the September 28, 2021 meeting were tabled to the next meeting.

**Map 7 Lots 162 and 171/ SE79-424:** a public hearing under the requirements of the West Tisbury Wetlands Protection Bylaw and regulations to consider a **Notice of Intent** filed by Douglas Finn, for a project to 1) demolish and reconstruct a single-family dwelling on the existing foundation, 2) construct an accessory deck within the Buffer Zone to a Bordering Vegetated Wetland(BVW) adjacent to Seth's Pond, 3) replace an existing plank footbridge over a wetland, and 4) associated site work. The project location is 16 Scotty's Lane.

Members viewed the site plan and photographs taken at the site visit. Doug Finn apologized for the unpermitted work done at this property. He said he was under the misunderstanding that construction of a deck accessory to a single-family dwelling in the buffer zone is exempt under the state regulations. He had not reviewed the local bylaw.

According to Doug, the 1930s house is not in a condition that can be renovated. It will be demolished by hand and rebuilt in the existing footprint with there is no expansion in use or the number of bedrooms. There will be a partial second floor structure. Excavation for piers under the new structure where no crawl space currently exists. There is a small section of poured concrete foundation on the northern side of the house that may need repair. The only change from the original narrative is the withdrawal of the footbridge. No other structures are planned.

Associated site work consists of basic boundary style fencing including a split rail fence Doug constructed over the weekend of October 9-11. This split rail fence runs to within 20 feet of the pond and is made from untreated southern yellow pine. The only clearing done to install this fence the 10" diameter post hole. This type of fence is exempt under the state regulations but not exempt under the local bylaw.

Doug is also proposing a 5-6-foot stockade privacy fence between the house and the driveway away from the wetland. The posts would be non-pressured treated wood, but the panels would be pressure treated. The fence locations are not shown on the project plan.

Commissioner's Comments/ Questions:

Unpermitted detached deck: Geraldine asked the board whether they would have approved this deck if it had been brought to the board prior to its construction. Maria told the members that under 310CMR 10.02 (2)(b)2e, conversion of lawn to uses accessory to residential structures such as a deck are exempt, provided; the activity, including material staging and stockpiling is located more than 50 feet from the mean annual high-water line with the Riverfront Area, Bank or from BVW, whichever is farther and erosion and sedimentation controls are implemented during construction. The deck is 33' from the BVW at its closest point. Accessory decks are not exempt under the local bylaw.

John said he may not have approved of a deck of this size in this location if it had come for approval before it was built, but he doesn't know if the applicant should be required to take it down. According to Doug, the deck will not have to be removed to do the demolition or rebuild. He said the footings for the deck are not pressured treated wood, but the rest of the deck is. Peter suggested that if the deck had been reviewed before it was built, the stairs closest to the pond may have been eliminated.

Maria asked Doug if a building permit for the deck was issued by the Building Inspector. Doug responded that he was not aware that he needed one given the height and the construction. Doug will be in touch with the Building Inspector to confirm this.

Decking around sheds: At the October 6 site visit Becky Finn told members that they put the decking on the back of the sheds because they were noting erosion. The grade behind these sheds drops off towards the wetland. Doug explained that the decks are set on cinderblocks and were installed as a way to create access to the back of the sheds without creating more erosion. There is a greenhouse type structure that the Finns plan to take down. Whit noted that if the board had been consulted before the decks were put on, an alternative might have been found.

Pump house near the pond: This structure has been re-roofed and shingled. Doug said the structure is approximately 90 years old.

House Plans: Peter commented that some indication of a construction limit of work would be helpful to the board and to the people doing the project. Doug said he would expect to keep a 6-10-foot work area around the existing dwelling. Doug will have the location of the erosion control measures shown on the project plan. Maria asked how they plan to contain erosion of the retaining wall during reconstruction of the house. Doug said there is a garden between the house and the retaining wall.

Peter asked if there are construction drawings of the house. Doug said they only have a rough idea of what they would like to do. Peter suggested that one condition would be to have the construction drawings submitted to the board prior to the pre-construction site visit. John wants to see engineering plans before issuing a permit. Doug replied that it will take at least two years.

Public Comment:

A letter from John Previant and Barbara Smith dated September 20, 2021 was noted for the record and discussed. Both reiterated their concerns about the unpermitted deck and the fences around the property.

Ben Zimmerman said he echoed the concerns expressed by Barbara Smith. He added that the sheds have been expanded without prior approval of the board.

A motion was made and seconded to continue the public hearing on this Notice of Intent to December 14, 2021 at 5:10 PM to give the applicant time to have engineered construction drawings for the new house

drawn up and to have the Building Inspector determine the status of the deck. Roll Call Vote: Angela – aye, Donna – aye, Geraldine – aye, John – aye, Peter – aye, and Whit -aye.

### **New Public Hearing**

**Map 31 Lot 48:** a public hearing under the requirements of G.L. Ch.131 § 40, as amended, and West Tisbury Wetlands Protection Bylaw and regulations, to consider a Restoration Plan submitted in response to an Enforcement Order issued by the Commission to Nancy B. Eppel individually, and as Trustee of the Nancy B. Eppel Revocable Trust u/d/t dated October 31, 2014, and Cheryl C. Eppel for a wetland violation that took place on property located at **21 New Lane** owned by Robert A. Doane and Cynthia L. Doane, Trustees of the Irrevocable Living Trust of the Doane Children u/d/t dated May 3, 1989 as amended.

Whit prefaced opening the public hearing on this matter by reminding everyone that this is a volunteer board appointed to do their best to administer the Wetlands Protection Act and the West Tisbury Wetlands Protection Bylaw and that this is not a court of law. It is difficult to separate out the issues in this matter given the inclusion of legal representation of each of the parties which seems to make it more complicated than it needs to be. He would like to limit the opinions of the attorneys present to matters related to the violation before the Commission.

The following documents are noted for the record and reviewed:

- Ratified Enforcement Order approved on August 24, 2021, issued on September 2, 2021 and ratified on September 14, 2021
- The proposed restoration plan submitted by Scott Smyers of Oxbow Associates dated September 13, 2021 are required by the Enforcement Order
- Survey showing Oxbow Associates wetland delineation prepared by P. J. F. and Associates dated October 4, 2021
- A video dated May 18, 2021 and undated photograph submitted by Ben Hall, Jr. attorney for Cheryl Eppel
- Letter from Richard Johnson, agent for Wes Nagy dated September 24, 2021 re Map 31 Lot 48.
- Letter from Morrison Mahoney LLP, attorneys for Nancy Eppel dated October 11, 2021
- Letter from Ben Hall Jr. dated October 12, 2021 and two undated old photos submitted along with a letter from Ben Hall, Jr., that was submitted as this meeting was starting. The pictures were viewed but the letter was not included in tonight's discussion. It will be taken up at the next hearing on this matter.

The Enforcement Order concerns a 2, 365 square foot area of land within the Buffer Zone to a Bordering Vegetated Wetland and Coastal Bank in Tiah's Cove on Tisbury Great Pond. [Reference is made to the minutes of August 24 and September 14 regarding the circumstances surrounding the issuance of the Enforcement Order. ]

Whit suggested that the board discuss tabling or postponing action on the restoration plan before the Commission until the legal proceeding play out. John concurred, referencing the letter from Richard Johnson who suggested that no plantings be done for a growing season.

Geraldine said that the board should not be concerned that there are 4 lawyers present and should look at what Oxbow Associates submitted for a restoration plan. She pointed out that the board does not allow the use of herbicides to treat poison ivy and green brier.

Richard Reiling, Doane family attorney said that his client understands the board is not going to determine who is going to pay the cost of restoration. That issue will be determined in Dukes County Superior Court. The Doanes are only seeking approval of the restoration plan submitted on their behalf by Oxbow Associates. Richard said that the Doanes are concerned about the erosion, poison ivy, and green briars. They think it is unreasonable not to approve a restoration plan in light of these concerns.

Robert Doane said he wants the property to be restored as soon as possible to the board's satisfaction. The matter of who pays for the restoration is not a matter for the Commission.

Peter noted that at the August site visit there was no evidence of erosion into the pond. The past practice of the board has been to require that the root matter be allowed to grow back and reevaluate after a growing season when the Buffer Zone has been cleared without permission.

Maria referenced the letter submitted by Richard Johnson in which he does not recommend the use of triclopyr based herbicides on the poison ivy because it is a native plant that is the "larval food for several moths and whose berries are eaten by many birds." In his opinion it seems "inconsistent with the stated goal."

Non-native invasive species are usually approved to be hand pruned and removed from shrubs and trees. Green brier and poison ivy are native species so only time they are allowed to be removed from trees by hand is if they are impacting the health of the tree or shrub.

Scott Smyers of Oxbow Associates who wrote the restoration plan acknowledged that is an elaborate plan for the restoration of an area of mown shrubs but he is concerned about an imbalance in the plant community in this area if the poison ivy and green brier out compete the native shrubs. He questioned the board's commitment to habitat restoration if they required the site to grow back on its own for one season before determining what plants will be necessary to restore the plant community.

John asked Whit and Peter to point out previous sites where the board has required either restoration or that the area be allowed to grow back. Peter said the best example is a property on the north shore where a property owner brush cut a significant amount of vegetation along a stream in the Bordering vegetated wetland and buffer zone. DEP issued a fine for this violation. The area was required to be allowed to grow back. Whit said it depends on the site condition. A steep slope would require a different restoration plan because of potential erosion where a flat site is usually left alone to grow back.

Maria referenced the West Tisbury Wetlands Protection Bylaw regulations that established a 25-foot No-Disturbance Zone where no landscaping work is allowed. The board has had numerous applications for pruning the shrub layer in the No -Disturbance Zone and this request is almost never approved. She added that brush cutting of the herbaceous layer is never permitted as part of a view clearing project (as defined in the state regulations as vista pruning which does not include the mowing or removal of understory brush) as was done on the Doane property.

John said the area that has been disturbed needs to be restored in the best manner possible whether that is leaving the area alone for a year or scaling back the proposed restoration plan so that the disturbance caused by the amount of proposed planting doesn't create more of an issue.

The board viewed the plan restoration plan of the 2,365 square ft area in detail.

Issues discussed:

- Use of herbicides: Will not be allowed.

- Erosion control filter mitt is probably not necessary but if used a spec sheet must be submitted indicating the composition of the compost material inside the mitt.
- Trees and shrubs: Proposal calls for 6 trees including 3 Cherries, 2 Oaks and 1 Beech of in inch diameter/6-8 feet high) and 32 shrubs of native stock 18 to 24 inches in height and or in a least one-gallon containers. The number of new trees is a 1:1 replacement ratio. 1-2 gallons of top soil will be added to each planting.
- Space them out between sprouts that are coming up from the ground cover and where the stumps are. Scott is looking for some flexibility based on the location of what is growing back.
- No mature trees were cut. The largest diameter is maybe 3". In Scott's opinion these trees were probably cut before.
- Irrigation: Temporary above ground if any. A water source is a long way from the house. John said the difficulty with irrigation argues for fewer trees and shrubs.
- Seed Mix: Patches of disturbed soils will be seeded with native seed mix such as New England. All work will be done by hand. Angela said the seed mix should be Island Native seed mix not New England seed mix.

Peter said fewer shrubs and fewer trees will cut down on soil disturbance and possible erosion. He suggested that there be no plantings within 10 feet of the top of the bank. Geraldine added that the number could be revisited in a year. The closest wetland flag is almost at the top of the bank.

Maria asked that the survey be revised to show the No-Disturbance Zone.

Whit asked Dick Johnson to comment. Dick was hired by Wes Nagy (a friend of Cheryl Eppel) to review the restoration plan prepared by Oxbow Associates. He agreed with the board that a lower number of plantings is a step in the right direction. He doesn't recommend planting Cherry trees as there are so many already.

Tom Liddy, Wetland Scientist with Lucas Environmental spoke on behalf of the Eppels. He has reviewed the Oxbow plan but has not been permitted onto the site so he could not offer his professional opinion. He stated that he agreed with reducing the number of plantings. His comments are based on his review of the plans and the photographs and other various sources, he agreed that a reduction in the number of plantings would result in less disturbance.

According to Ben, the Doanes have not allowed the Eppel's experts to access the site. Ben asked that a video and undated photo he submitted be entered into the record. The board did so. Ben said the video shows that the Doanes proposed plan is not a remediation plan but an augmentation plan. Ben said the video represents the exact location. The October 2020 photograph was taken from the top of the hill at the Eppel property and shows a view shed that is open.

Ben referenced the letter submitted by Morrison Mahoney that included photographs of the site showing that no trespassing signs have been posted. Whit said that the Eppels and their experts could walk down to their property line to view the area.

Ben said the video shows that there wasn't wholesale removal of vegetation. Members compared the video to the photos that show the brush cutting and shrubs that were removed. It is clear from the photos that the site in the video was brush cut.

Ben reminded the members that they offered the Eppels an opportunity to submit a plan of their own, but because the Doanes refuse to let the Eppels on the property, they haven't been able to do so. Ben asked that the hearing be continued until the court process allows the Eppels to access the property.

Geraldine made a motion, seconded by Angela to implement the planting plan submitted by Oxbow Associates with the following changes:

A reduction in the number of trees from 6 to 4 and the shrubs from 32 to 20 to be staked out for the board's inspection at a site visit on October 20, 2021, delete the use of herbicides and submit details on the proposed erosion control measures; replace New England Native Seed mix with Martha's Vineyard Native seed mix, and revise the Oxbow plan to show the 25' No-Disturbance Zone. Roll Call Vote: Angela – aye, Donna-aye, John -aye, Geraldine-aye, Peter-aye, and Whit -aye.

After the vote was taken, Peter asked that Mr. Hennessey be allowed to address the meeting. Mr. Hennessey said they stand by the points and issues raised in their letter. They have requested that Nancy Eppel be removed as the violator on the Enforcement Order. He acknowledged that the pending lawsuit is not purview of the board but naming Mrs. Eppel as one of the violators, is important to the outcome of the current litigation. Maria explained that Nancy Eppel was listed as the violator because she is the record owner of the land from which the area in question was accessed and whose property the clearing benefited.

The Richard Reiling, the Doane's attorney offered to submit a handwritten letter from Mrs. Eppel taking responsibility for the clearing. Maria said the board might want to ask counsel about this request. The request was tabled.

**Old Business:**

**Map 7 Lot 28.1/Blackwater Brook Farm and Map 3 Lot 71 Lumberyard:** Libby Soo Hoo, Edmund Cottle and Janet Johnson will come to the November 9 meeting to discuss matters related to Blackwater Brook, the farm and the lumberyard. No action was taken.

**Climate Action Plan Committee:** A request from Kate Warner for the board to appoint a member to this committee was tabled to the next meeting.

**Administrative:**

**Correspondence:**

**In:** Documents noted for the record above

**Out:** Letter of Support for House Bill 909 to provide housing within the Manuel F. Correllus State Forest  
Blackwater Brook (a/k/a Coca- Cola Brook)/bacteria testing/letter  
Finance Committee Reserve Fund Transfer Request re: Parrot Feather project

There being no further business to conduct, the meeting adjourned at 7:45 PM.

Respectfully submitted,

Maria McFarland  
Board Administrator  
APPROVED  
NOVEMBER 09, 2021